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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No 956

ILLINOIS PROTESTANT CHILDREN'S HOME, INC., an Illinois Not for Profit Corporation,

Petitioner,

v.

PEOPLE *ex rel.* THE DIRECTOR OF THE DEPARTMENT OF CHILDREN AND FAMILY SERVICES, etc.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Petitioner, the Illinois Protestant Children's Home, Inc., prays that a writ of certiorari issue to review the judgment of the Supreme Court of Illinois in the above-entitled proceeding.

CITATIONS TO OPINIONS BELOW

The Report of the Master in Chancery and the Order of the Judge of the Circuit Court of Cook County adopting said Report are unpublished and are printed in Appendix B hereto, *infra*, p. 23. The opinion of the

Supreme Court of Illinois, printed in Appendix A, *infra*, p. 17, is reported at 33 Ill. 2d 60, 210 N.E. 2d 217.

JURISDICTION

The judgment of the Supreme Court of Illinois was entered on May 20, 1965. A timely Petition for Rehearing was filed on June 3, 1965, and was denied on September 27, 1965. On December 17, 1965, Mr. Justice Clark granted an extension of time within which to file this Petition to January 26, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3), since the validity of a state statute is drawn in question on the grounds of its repugnancy to the Constitution of the United States and since a right is claimed under the Constitution of the United States.

QUESTIONS PRESENTED

1. Whether a statute authorizing the public agency charged with the duty of administering a Child Care Act to employ a private individual, group, or institution to make investigations of the qualifications of an applicant for a license to operate a children's home deprives the applicant of due process of law and equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States, by subjecting the applicant to inherently unfair and inconsistent standards and procedures.

2. Whether, in an action brought by a state agency to enjoin the operation of a privately supported child care institution on the ground that it has no license, the court may deny standing to the institution to raise a federal constitutional objection to the licensing scheme because said institution has not applied for a

license under the scheme that it alleges to be unconstitutional.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment XIV, Section 1:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Ill. Rev. Stat. (1963), ch. 23, sec. 2316(b):

> "Upon filing of the application in proper order, the Department shall examine the facility of the applicant proposing to care for children. *Such examination may be made by a duly licensed child welfare agency or other suitable agency or person designated by the Department as its agent for that purpose.* If, upon examination, the Department is satisfied that the applicant and facility reasonably meet the qualifications and standards prescribed for the type of facility for which the license is made, it shall issue to the applicant a license in proper form..." (Emphasis supplied).

STATEMENT OF THE CASE

Petitioner has been engaged in caring for orphaned, homeless, and dependent children since 1919. It is a non-profit corporation that has, throughout the entire period of its existence, been entirely supported by private contributions (Abst. 1, 16, 47-48). Petitioner had been duly licensed by the State of Illinois from the time licensing was first instituted until

March 9, 1956, when renewal of its license was refused by Respondent's predecessor, the Department of Mental Health, which asserted as grounds for denial some twenty-seven charges (Abst. 13-17).

An extensive administrative hearing was held on these charges, the bulk of which related to alleged substantive deficiencies in the operation of the Home and were withdrawn by the Department or rejected by the Hearing Officer as inadequately supported by the evidence. The Department's action was upheld by the Hearing Officer predominantly on the basis of charges relating to the failure of Petitioner to make available to the Department various required records and reports (Abst. 16). Petitioner then sought review of this decision in the Circuit Court of Cook County, the Appellate Court for the First District, the Supreme Court of Illinois, and the Supreme Court of the United States.

The instant action was initiated in the Circuit Court of Cook County on March 19, 1962, by Respondent's predecessor during the pendancy of Petitioner's appeal to the Appellate Court from a decision of the Circuit Court upholding the administrative action. In the instant action, which was separate from the then-pending proceeding, the Department of Mental Health sought an injunction, pursuant to a special enforcement statute just enacted, Ill. Rev. Stats. (1963) sec. 63(b)(11), against further operation of Petitioner's home. The Department alleged nine violations of the Child Care Act nearly identical in substance to charges that had been dismissed in the license renewal proceeding (Abst. 2, 8-9). A temporary injunction was issued prohibiting new admissions to Petitioner's home, and the matter was referred for hearing to a Master (Abst. 4, 16).

While the matter was being heard before the Master, the Appellate Court affirmed the judgment of the Circuit Court in the renewal proceeding, the Supreme Court of Illinois denied leave to appeal, and the Supreme Court of the United States denied a Petition for writ of certiorari, *Illinois Protestant Children's Home v. Department of Public Welfare*, 372 U.S. 967 (1963). Seven months after the termination of the license renewal litigation, Respondent's predecessor filed a Supplemental Complaint requesting that the fact-finding proceeding be closed and a permanent injunction restraining Petitioner from further operation of its Home be issued, on the sole ground that Petitioner was operating the Home without a license and entirely without regard to the merit of the charges made against the Home (Abst. 21-23).

On March 9, 1964, the Master issued his report recommending that the permanent injunction be issued on the sole ground that Petitioner was unlicensed and rejecting Petitioner's arguments of law, including those asserting the claim of violation of the Fourteenth Amendment to the Constitution of the United States (App. B., *infra*). On April 8, Petitioner wrote Respondent applying for a license for the year 1964. On April 13, 1964, prior to the time any response was received to Petitioner's letter of application, an order was entered by the Circuit Judge granting the requested permanent injunction (App. B, *infra*). The injunction was based solely upon the absence of a license, there having been no finding of any other violations of the Act by Petitioner.

A direct appeal was taken to the Supreme Court of Illinois. Among the questions there raised by Petitioner was that presented by Question 1 in this Petition, *supra*, p. 6. The Supreme Court of Illinois refused to pass on the question, asserting as grounds

for refusal a supposed lack of standing on Petitioner's part to raise the question because it had not applied for a license.

REASONS FOR GRANTING THE WRIT

1. Delegation of Fact-Finding Function to Private Individuals or Groups Is Unconstitutional.

This case raises a significant, unusual, and fundamental issue relating to the constitutional limits on the mode of execution of an administrative licensing scheme. Under the applicable Illinois Statute, popularly known as the Child Care Act, a person or organization desiring to operate a child care facility is required to apply for a license, and the Department of Children and Family Services is to conduct an examination of the applicant's facility in order to ascertain whether it meets the qualifications and standards prescribed by the Department. However, the statute provides that

> ". . . Such examination may be made by a duly licensed child welfare agency or other suitable agency or person designated by the Department as its agent for that purpose . . ." Ill. Rev. Stat. (1963) ch. 23, sec. 2316(b)"

In other words, the statutory scheme provides for delegation to a competing private child care facility of the vital function of investigating and assessing the qualifications and facilities of an applicant, an authority that is exercised in processing most applications.

One must go far to find a more volatile battleground than that upon which psychologists and sociologists war over the proper methods of raising children. The fact that there exist competing and often conflicting theories of child care does not, of course, preclude

the state from exercising scrupulous regulation over those institutions devoted to the care of orphaned, homeless, and dependent children. But the licensing scheme envisioned by the Illinois statute, far from fostering a consistent application of well developed standards, threatens the introduction of widespread chaos and irregularity in the governance of such institutions. Institutions representing all points along the ideological spectrum may be selected, each in turn or on any whimsical, irregular, or spasmodic basis that the Department might hit upon, to evaluate the qualifications of those who would be its competitors.[1] Nothing in the statute or regulations promulgated thereunder guards against the great potentiality for unfairness incident to the administrator's power to select, from hundreds of diverse institutions already licensed, the one that will investigate a particular applicant. Accordingly, one applicant may be blessed with an investigator whose concepts of child care are comfortably agreeable to those of the applicant, while another is cursed with an investigator from the opposite end of the ideological spectrum. The grave potentialities for abuse inherent in the Illinois scheme deprive any potential applicant of due process of law and

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[1] The competition is predominantly ideological, of course, rather than financial, but this would only sharpen the vigor with which one institution might pursue its ideological opponent.

of the equal protection of the laws guaranteed to him by the Fourteenth Amendment.[2]

Accordingly, the licensing arrangement to which Illinois seeks to subject Petitioner violates a fundamental requirement for permissible administrative regulation.

> ". . . unless the apparent discrimination is required to effectuate one of the purposes of the act a regulation must be held to be arbitrary and capricious if its provisions are such that all persons who are similarly situated are not dealt with upon an equal basis but greater burdens are laid upon one than are laid upon others in the same calling and condition." *Booth Fisheries Corp. v. Bowles*, 153 F2d. 449 451 (Em. Ct. App. 1946)

It has been many years since the Supreme Court or other federal courts have had occasion to deal with this type of question. The leading decision addressed to the question of the constitutional implications of delegation of the regulatory function to private individuals or groups is *Carter v. Carter Coal Co.*, 298 U.S. 238, 56 S.Ct. 855 (1936). In the Bituminous Coal Conservation Act of 1935, Congress had delegated the power to fix maximum hours and minimum wages to a

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[2] More is at stake than the important right of Petitioner to operate its facility free from arbitrary and unreasonable regulation. Petitioner also represents those parents who, unable to care for their children themselves but nevertheless concerned for their welfare, select Petitioner as the desired agency to care for their children. *Cf. Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571 (1925). The important interest of the parent, in making provision for the welfare of his family, to have a broad choice of facilities from which to select, should be limited only as the result of careful and fair regulatory policy and not through the haphazard element of chance inherent in this statute.

stated proportion of the producers and miners of coal as part of its effort to mitigate the catastrophic conditions affecting the coal industry at that time. The court vigorously rejected this action:

> "The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business . . . . The difference between producing coal and regulating its production is, of course, fundamental. The former is a private activity; the latter is necessarily a governmental function, since in the very nature of things, one person may not be entrusted with the power to regulate the business of another, and especially of a competitor. And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question. *Schecter Poultry Corp. v. United States,* 295 U.S. 495 at page 537, 55 S.Ct. 837, 79 L.Ed. 1570, 97 A.L.R. 947, *Eubank v. Richmond,* 226 U.S. 137, 143, 33 S. Ct. 76, 57 L.Ed. 156, 42 L.R.A. (N.S.) 1123; *Washington ex rel. Seattle Trust Co. v. Roberge,* 278 U.S. 116, 121, 122, 49 S.Ct. 50, 73 L.Ed. 210, 86 A.L.R. 654." 298 U.S. at 311-12; 56 S.Ct. at 873.

Petitioner recognizes that much of what the *Carter Coal* decision stood for has gone by the boards in

the light of subsequent historical developments and judicial decisions. That is not so, however, as regards the above-quoted proposition, which is central to this Petition.[3] Indeed, even the dissenters in *Carter Coal* did not disagree with the holding that the delegation of power to private parties violated the due process clause; instead, they rested their position on a liberal view regarding the severability of the fatally defective wages-and-hours provision from other portions of the statute. See *id.* at 334-38, 56 S.Ct. at 883-85.

Carter Coal does not rest simply on the Court's view of the limits of permissible delegation under the federal system of separation of powers, as to which, of course, the states could adopt a different approach. Rather, it addresses itself to the fundamental unfairness of the grant by the legislative branch of governmental power to private individuals, which it finds a clear violation of the due process clause of the Fifth Amendment, and which must be found equally to be a violation of Fourteenth Amendment due process. Moreover, the *Eubank* and *Roberge* cases cited by the Court in *Carter Coal* evidence the applicability of the central proposition to the states as well as to the federal government.

A different type of case arose in connection with the Selective Training and Service Act, under which

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[3] In *Yakus v. United States*, 321 U.S. 414, 64 S.Ct. 660 (1944), the Court upheld a sweeping delegation of power to the executive branch. However, Mr. Chief Justice Stone, speaking for the Court, was careful to distinguish *Schecter Poultry*, and, implicitly, *Carter Coal*, by stating that, in those cases, "The function of formulating the codes was delegated, not to a public official responsible to Congress or the Executive, but to private individuals engaged in the industries to be regulated." *Id.* at 424, 64 S.Ct. at 667.

local draft boards created "advisory theological panels" to investigate and report on claims of exemption on the basis of preparation "for the ministry in theological or divinity schools." The Supreme Court upheld this practice under the limited and special circumstances present in *Eagles v. United States*, 329 U.S. 304, 67 S.Ct. 313 (1946). It was clear in the circumstances of that case that the function of the panel was advisory only and that use of the panel was warranted by the expertness it was able to bring to bear on the question, an expertness that could not be found or expected in the draft board itself. Compare *United States v. Balogh*, 157 F.2d 939 (2d Cir. 1946), *rev'd on other grounds*, 329 U.S. 692 (1947), in which Judge Hand placed considerable emphasis on the fact that the members of the panel were of a different religious faith from the defendant.

There is a critical distinction between the selective service advisory panel situation and that pertaining under the Illinois act. In the former, draft boards were confronted with the problem of processing thousands of potential inductees during a time of national emergency. Moreover, the claim of exemption on the basis of theological study was one regarding which the local boards had little or no knowledge and were in a poor position to evaluate. The use of narrowly limited panels for solely advisory purposes could, under those circumstances, be justified. Petitioner confronts an entirely different situation, however. The Department of Children and Family Services does not have thousands of applications that must of necessity be processed in a somewhat cursory manner. Nor ought it to be lacking in the expertise required to evaluate such applications. Thus, whereas a rational and consistent policy regarding theological students could not be expected *without* the use of panels, quite the con-

trary is true in the instant case, where the use of private factual investigators can only lead to inconsistency and arbitrariness in dispensing licenses.

The evil condemned in *Carter Coal* involved the delegation of rule-making functions, whereas Petitioner's complaint in the instant case goes to delegation of fact-finding functions to private individuals or groups. If anything, this distinction vastly strengthens Petitioner's claim. It may well be both sound policy and good politics to permit interested and affected private groups to participate in the formulation of rules of conduct applicable to them as a group. Indeed, the Illinois Child Care Act authorizes and encourages the Department to solicit the advice of interested and qualified persons and groups in the field of child care. Ill. Rev. Stat. (1963) ch. 23, sec. 2318. But this is a far cry from a delegation of fact-finding duties to one, very possibly atypical, institution. No social or democratic ideal can possibly be served by or advanced in justification of this approach.[4]

The Illinois scheme also, by its very nature, deprives applicants of equal protection of the laws, since the grant or denial of a license application will be affected by the singular qualities of judgment of the particular private person or institution selected to conduct the investigation of an applicant and to provide the Department with the only information on which it

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[4] Even in the field of licensing and regulating the legal and medical professions, where members of the profession are sometimes utilized in a more limited and controlled fashion than here, an eminent authority has warned that "Such a power when lodged in the officialdom of a profession is dangerous." JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 84 (1965).

can, as a practical matter, base a judgment. Judgments on inquiries of the sort that are central to the decision whether to license an applicant as a child care institution must inevitably be colored by the unique ideology and perception of the investigator. This makes it essential to place the conduct of such investigations in the hands of a unified, permanent agency responsive and responsible to the public and the legislature. Otherwise, the differences of approach and bias preclude evenhanded regulation.[5]

2. Petitioner Has Standing to Raise Federal Constitutional Objection to Licensing Act.

The Supreme Court of Illinois refused to consider Petitioner's attack on the provision of the Child Care Act authorizing the Department to delegate to private competing institutions the function of investigating license applications. The refusal was grounded on the failure of Petitioner to make a "proper application for a new license," the Court stating that it would "not anticipate constitutional questions."

It is well settled that standing to raise a federal constitutional question is a matter of federal law. *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 79 S.Ct. 437 (1959); *Staub v. City of Baxley*, 355 U.S. 313, 78 S.Ct. 277 (1958); *First Nat'l Bank of Guthrie County v. Anderson*, 269 U.S. 341, 46 S.Ct. 135 (1926).

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[5] The equal protection clause encompasses not only discriminatory classifications by the legislature, but also discriminatory administration. *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064 (1886). Here, the Illinois legislature has adopted a scheme that must necessarily lead to uneven and discriminatory administration.

Whether application for a license is an essential prerequisite to standing to challenge the constitutionality of the licensing scheme will, of course, depend on the circumstances of a particular case. There have been many instances in which a state court's finding that there was no standing has been overturned by the Supreme Court. As has been indicated:

> "The decisions of this court have uniformly held that the failure to apply for a license under an ordinance which on its face violates the Constitution does not preclude review in this Court of a judgment of conviction under such an ordinance." *Staub v. City of Baxley,* 355 U.S. 313, 319, 78 S.Ct. 277, 281 (1958).

> "The Constitution can hardly be thought to deny to one subjected to the restraints of such an ordinance the right to attack its constitutionality because he has not yielded to its demands." *Jones v. City of Opelika,* 316 U.S. 584, 602, 62 S.Ct. 1231, 1242 (1942).

See also, *Lovell v. City of Griffin,* 303 U.S. 444, 58 S. Ct. 666 (1938); *Smith v. Cahoon,* 283 U.S. 553, 51 S.Ct. 582 (1931). The inquiry must, in each instance, consider the circumstances in which the person subject to the ordinance finds himself and the effect upon him of requiring a license application. In the instant case, such considerations militate in favor of a finding that Petitioner has standing.

Petitioner, a defendant in an injunction proceeding based, ultimately, solely on Petitioner's lack of a license, is attacking the licensing statute as written. This Court found no standing problem under the similar circumstances present in *Morey v. Doud,* 354 U.S. 457, 77 S.Ct. 1344 (1957). It is not possible, more-

over, for this statute to be applied to Petitioner in a manner consistent with the requirements of due process and equal protection. This would be true even were Respondent to deviate from its usual practice and itself conduct the investigation of Petitioner's facility, since the investigation can not, of necessity, be governed by a set of uniform principles and standards when other applicants similarly situated are investigated by various private individuals and agencies.

Furthermore, the particular posture of the instant litigation is such that the requirement imposed on Petitioner by the Illinois courts to go through the application process would—indeed, has, by virtue of the injunction presently outstanding—cause irreparable harm to Petitioner. At the time the refusal to renew Petitioner's license became final in the separate litigation, Petitioner was in the midst of defending the injunction proceeding in which the issue was, or at least appeared to be, substantive violations of the Child Care Act. All these charges were then dropped, and Petitioner was ordered to cease its activities pending its submission to a licensing scheme that, in its view, is subject on its face to a fatal constitutional defect. However, just as the license renewal matter was not concluded for more than seven years, so can Petitioner expect that it may be many years before it could obtain a license even if entitled to one. And during that entire period Petitioner would be subject to an injunction precluding it from continuing operations that it had been regularly engaged in for the preceding 45 years. How this can be characterized as a "relatively minor inconvenience" by the Supreme Court of Illinois, App. A, *infra*, p. 21, is difficult to understand.

CONCLUSION

This case presents an unusual and important question relating to the power of a state to provide a procedure for evaluating license applicants that places the determination largely in the hands of private persons or agencies selected on an ad hoc basis. The ramifications of the question are extensive, and it is an appropriate time for the Court to address itself to the problem after the many years it has gone unconsidered.

For the foregoing reasons, this Petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

OPINION OF THE SUPREME COURT OF ILLINOIS

Mr. JUSTICE UNDERWOOD delivered the opinion of the court:

This direct appeal from a Cook County circuit court decree permanently enjoining appellant from operating a child care agency questions the constitutionality of licensing provisions of the Child Care Act (Ill. Rev. Stat. 1963, chap. 23, par. 2301)

Appellant was first chartered as a child care agency in 1919. In 1956 its license to so operate was not renewed by the Department of Public Welfare. Appellant sought review of this administrative decision and appealed a circuit court decree sustaining the refusal to renew. The Appellate Court affirmed *(Illinois Protestant Children's Home v. Department of Public Welfare,* 35 Ill. App. 2d 306), this court denied leave to appeal and certiorari was denied by the United States Supreme Court.

While the license renewal litigation was pending on appeal, the Department, (now known as the Department of Children and Family Services) initiated action pursuant to a special enforcement statute (Ill. Rev. Stat., 1963, chap. 127, par. 63bII) to enjoin appellant's continued operation of its home. From the issuance of an injunction permanently restraining appellant from operating "a child caring institution" without a license, this appeal was taken.

Appellant argues that it has been unconstitutionally denied the right to trial by jury since section 29(7) of the Child Care Act provides that the operation of an unlicensed child care facility is a misdemeanor, and, therefore, any action instituted to enjoin such operation amounts to a criminal proceeding where trial by jury is guaranteed. However, this cause was instituted pursuant to the above cited special enforcement statute and, although it was brought on behalf of the People, it does not constitute a criminal proceeding. Notwithstanding the general rule that equity will not enjoin the commission of a crime, the legislature may provide for injunction proceedings to protect the public health and welfare. (*Burden v. Hoover,* 9 Ill. 2d 114, 119). The issue raised here was decided contrary to appellant's contentions in *Village of Spillertown v. Prewitt,* 21 Ill.2d 228, where the village had enacted an ordinance providing for a fine to be levied against persons engaged in strip mining within the corporate limits. The village sought to enjoin defendant from engaging in strip mining on his property. We there held that a defendant may be enjoined from violating the ordinance, and he may not claim that chancery has no jurisdiction and that the case is criminal, as equity has jurisdiction where enforcement of the criminal law is merely incidental to the general relief sought.

While appellant contends the licensing provisions of the Child Care Act are unconstitutional delegations of legislative power in that they fail to establish adequate standards for the guidance of the administrative agency, we are concerned with appellee's charge that appellant has no standing to challenge the constitutionality of the act. The essence of this argument is that section 16(a) of the Child Care Act (par. 2316(a)) provides that applications for license shall be upon

forms furnished by the Department; that no such application was ever made; and that, therefore, the Department has never made a determination that a new license will not be issued. Consequently, appellee argues, appellant cannot complain of the provisions of an act which have not yet been used to its detriment. Appellant's answer to this is that the provisions of section 16(a) make the use of such forms by the applicant a condition precedent to processing of the application and the Department is given unlimited discretion as to what information shall be therein requested; that such delegation of unlimited discretion is constitutionally objectionable, and invalidates the requirement that applications may be made only on the forms prescribed by the Department.

It is not disputed that appellant, upon termination of the litigation regarding renewal of the old license, sent a letter to the Department requesting a new license. In response thereto, appellant was furnished with the necessary forms. Apparently these were never executed nor filed for the reason that appellant regards as unconstitutional the requirement that such forms be used.

In his argument appellant relies principally upon *McDougall v. Lueder,* 389 Ill. 141. We there held a statute requiring currency exchanges to file applications for licenses was unconstitutionally vague and indefinite where the only statutory standard was that the applications contain names and addresses of applicants and "such other information as the auditor may require". It consequently amounted to an unlawful delegation of legislative power since applicants might be subjected to varying requirements. Here, however, there are set forth in section 18 eleven specific areas with which the Department shall be concerned in pro-

mulgating rules and regulations for the enforcement of the act. Necessarily, the inquiries upon the application form must be limited thereto. In *McDougall* there was no requirement directing the auditor to apply uniform standards, while here the principles of uniformity and reasonableness are implicit in the act. We therefore hold that where, as here, the areas of inquiry upon the application are specifically limited by statutory designation, as well as the principles of uniformity and reasonableness implicit therein, sufficient legislative standards exist and the minute detail of the form contents may properly be delegated to those charged with administrative responsibility. (*Department of Public Works and Bldgs. v. Lanter,* 413 Ill. 581). Accordingly, the requirement that applications be made upon forms furnished by the Department is valid.

We have heretofore said "One of the most firmly established doctrines in the field of constitutional law is that a court will ordinarily inquire into the constitutionality of a statute only to the extent required by the case before it, and will not formulate a rule broader than that necessitated by the precise situation in question." (*Grasse v. Dealer's Transport Co.*, 412 Ill. 179, 201, *cert. den.* 344 U.S. 837, 97 L. ed 651, 73 S.Ct. 47.) In *People v. Diekmann,* 285 Ill. 97, 101, we said "This court will not discuss the constitutionality of a provision of an act which does not affect the parties to the cause under consideration or where the party urging the invalidity of such provision is not in any way aggrieved by its operation" Also, in *Gholson v. Engle,* 9 Ill.2d 454, plaintiff was precluded from attacking the examination provisions of an act dealing with the registration of funeral directors where he had not taken the examination and was not affected by that section of the statute. See, also, *Elliott v. Uni-*

versity of Illinois, 365 Ill. 338, 346; *Kettles v. People*, 221 Ill. 221, 233.

Since appellant has made no proper application for a new license, and no Departmental determination has been made with reference to the issuance of a new license, appellant cannot presently contend it is aggrieved by the other provisions of the act which it seeks to challenge. This court will not anticipate constitutional questions, and the relatively minor inconvenience of postponement of decision will not disturb that determination. See *Clay v. Sun Insurance Office, Ltd.*, 363 U.S. 207, 4 L. ed. 2d 1170, 80 S.Ct. 1222.

Accordingly, the decree of the circuit court of Cook County is affirmed.

Decree affirmed.

On rehearing:

In its petition for rehearing, appellant has for the first time presented argument in support of his questioned standing to contest the licensing provisions of the act. He maintains that standing to attack the Federal constitutionality of a statute is necessarily a Federal question (*Baker v. Carr*, 369 U.S. 186, 7 L.ed. 2d 663, and cites cases decided in the United States Supreme Court for the proposition that where a statute is invalid on its face and a defendant is prosecuted thereunder, he need not have previously applied for a license to engage "in the particular conduct as a condition precedent to constitutional inquiry." (*Smith v. Cahoon*, 283 U.S. 553, 562, 75 L. ed. 1264; *Lovell v. City of Griffin*, 303 U.S. 444, 82 L. ed. 949; *City of Chicago & Atchison, T. & S.F.R.R. Co.*, 357 U.S. 77, 2 L. ed. 2d 1174). However, those cases held the

statutes questioned therein entirely void as applied to the respective contestants. Here, the statute is not invalid on its face, and we have held the requirement of application forms as set forth in the statute valid as applied to appellant. Under such circumstances, it remains to be determined whether, after appellant has applied for a license employing the requisite forms, further constitutional inquiry is necessary. We accordingly adhere to our original opinion.

APPENDIX B

ORDER OF THE CIRCUIT COURT OF COOK COUNTY

This cause coming on to be heard upon plaintiff's motion for approval of the report of the Master in Chancery recommending that defendant be permanently enjoined from any further operation as a child care institution and defendant's exceptions to said Master's report, and the Court having granted leave to defendant to file an additional petition motion, and affidavit alleging the mailing by defendant to plaintiff of a letter of application for license dated April 8, 1964, and the Court having heard and considered all of defendant's additional pleadings and arguments in support thereof and being fully advised in the premises:

It is Ordered, Adjudged and Decreed as follows:

1. The Court finds that Chapter 127, Section 63b11, 5, Illinois Revised Statutes is constitutional.

2. The Court expressly overrules defendant's oral motions for rehearing and for a new trial of this cause.

3. The report of the Master in Chancery is approved and defendant's exceptions thereto, and all subsequent pleadings filed by defendant, having been considered, are expressly overruled.

4. That the People's Writ of Injunction issue against the defendant, its attorneys, agents, and employees permanently enjoining and restraining them from any further operation as a child caring institution, without a license.

5. That the People's Writ of Injunction further issue against the defendant, its attorneys, agents, and employees permanently enjoining and restraining them from interfering with the removal by the parents, or next of kin of the children or representatives of the plaintiff of all children now under defendant's care and custody.

6. That the aforesaid injunction issue without bond.

REPORT OF THE MASTER IN CHANCERY

The above entitled cause first came on for hearing before me on the Complaint and Answer.

In the Complaint the plaintiff charged that the defendant should be enjoined on two grounds:

(1) The defendant did not hold a license to operate a children's home.

(2) The defendant operated the children's home in an improper manner.

The Answer set up that the defendant had pending an appeal from an order affirming the state department's refusal to issue it a license, and denied it was operating the children's home in an improper manner.

The plaintiff proceeded to offer evidence only on the issue of the manner of operation of the home. When the plaintiff rested its case, the defendant made a motion for a finding for the defendant, which motion I denied.

The cause was then continued from time to time at the instance of the parties variously, until the plain-

tiff filed a supplemental complaint in which set up that subsequent to the filing of the original proceedings the decision of the Department of Mental Health, denying renewal of the defendant's license to operate as a child-caring agency had been finally determined by refusal of the Supreme Court of Illinois to grant leave to appeal from the decision of the Appellate Court of Illinois which decision had affirmed the decision of the Circuit Court of Cook County which had affirmed the decision of the plaintiff, and by the denial of certiorari by the United States Supreme Court.

The defendant filed a motion to dismiss the complaint and supplemental complaint on grounds hereinafter discussed.

This cause came on for hearing before me again on January 14, 1964. I advised the attorney for the plaintiff that unless he elected to withdraw the evidence offered upon behalf of the plaintiff on the manner of the operation of the home, and stand on the ground of want of a license, I would permit the defendant to offer evidence on the issue of the manner of the operation of the home. The said attorney elected to, and did, withdraw said evidence, and I directed that the matter be considered on the license question only.

In addition to its motion to dismiss, the defendant has filed objections and exceptions, which among other things, concern the withdrawal of the plaintiff's evidence (Nos. 1, 7, 8, 9 and 10).

I have concluded that objections and exceptions Nos. 1, 7, 8, 9 and 10 are frivolous in that it was within my discretion to permit the withdrawal of the evidence (88 Corpus Juris Secundum p. 203, 593, Trial), and there is no prejudice to the defendant since without the said evidence the plaintiff cannot have relief

on the ground of the manner of the operation of the home. There is, therefore, no question of due process since the home has not been deprived of any necessary opportunity to present evidence on that issue.

The issue of whether the plaintiff may have an injunction on the ground of want of a license is one of law entirely, (with the exception of the fact that the home has no license and that fact is not in dispute).

Since the institution of the above action, the enforcement of the child care act has been transferred by statute, effective January 1, 1964, to the Department of Children and Family Services, and on February 27, 1964, this Court entered an order substituting Donald Brieland, Director of that Department as relator.

I have concluded, with reference to the motion to dismiss, that:

1. The statute now applicable which allows the initiation of injunction proceedings (Sec. 63 b 11, Ch. 127) "wherever it shall appear to the Director of Children and Family Services that any person, group of persons, or corporation is engaged in any act or practices which constitute or will constitute a violation of the child care act or any rule or regulation prescribed under authority thereof," (by substitution of Sec. 53, chapter 127) is not vulnerable to the attack by the said motion on the ground that the statute violates due process requirements. While the Director has discretionary power to initiate proceedings, there is no need for the provision of standards to regulate his determination for the very reason that his determination is not conclusive on the defendant, and reference to an injunction suit necessarily implies that the defendant shall have its opportunity to defend and be

heard and to offer controverting evidence where necessary.

Once the proceeding comes into Court, all the characteristics of the exercise of equitable jurisdiction attach (CF. actions for the foreclosure of tax liens which exist only by statute, but which when filed are treated as are all other chancery actions. *People v. Cant*, 260 Ill. 497, 500.) (Ground 1 of motion to dismiss).

2. There is no question of standards of maintenance of homes at this point and this case, and no need to go into whether there was a proper prescription of standards. The issue is one of lack of license issued by the Department and its effect (Grounds 2, 3 and 4 of the motion to dismiss).

With reference to the objections and exceptions of the defendant, I have above dealt with objection No. 1, in effect, above, since it deals with the right of the defendant to offer proof on the manner of the operation of the home.

Objection No. 2 concerns the existence and coexistence of the various state departments. This is no problem since as of this date there is a Department of Children and Family Services, the director of which is presently the relator in this case.

Whether the plaintiff is entitled to relief depends upon the record as it exists now and not at the date of the filing of the complaint. Equity acts as of the present. (*Baker v. Salzenstein*, 314 Ill. 226, 233-4.)

Objections No. 3, and 4. It is unimportant as between whom the license litigation was conducted previously. Presently the defendant has no license and no action pending to obtain a license. This is the important fact.

Objection No. 5. This objection has been obviated by the withdrawal by the plaintiff of its evidence on the manner of operation of the Home.

Objection No. 6. This objection is rendered moot by the statutory authorization to the Department of Children and Family Services.

Objections Nos. 7, 8, 9 and 10. These objections I have dealt with in my statements about allowing the withdrawal of evidence.

Objection No. 11. The matter of the defendant's failure to have a license as of this date, is precluded by the administrative proceedings heretofore concluded. There is no pleading or evidence of *another* application made or pending or any court order in an administrative review holding that it was entitled to a license.

Jurisdiction of the Subject Matter

While the operation of a Home without a license is a misdemeanor (Sec. 2329, Ch. 23) and equity does not enjoin ordinarily the commission of crimes, there is statutory authorization for the maintenance of the present case (Sec. 63 b 11, ch. 127), and such statutory equity jurisdiction has been upheld in the instance a similar statute in *People ex rel. Carpentier v. Goers,* 20 Ill. 2d. 272, 276, where the Supreme Court of Illinois pointed out that the Statute expressly authorized issuance of an injunction "to enforce the provisions of this act, in addition to the penalties and other remedies in this Act provided." Section 63 b 11, chapter 127, contains similar language.

Recommendation

I recommend the issuance of a permanent injunction.

Inasmuch as the only question of fact involved is whether the defendant holds a license, and since there is no dispute that it does not hold a license and since my report otherwise concerns only conclusions of law, there is no need to permit the filing of objections before me, since exceptions as to conclusions of law may be filed by leave of Court without prior objections before a Master.

Accordingly this Report has been filed in this Court without permitting objections before me.

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SUPREME COURT, U. S.

FILED
MAR 24 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965.

No. 956

ILLINOIS PROTESTANT CHILDREN'S HOME, INC.,
an Illinois Not for Profit Corporation,
Petitioner,

vs.

PEOPLE ex rel. THE DIRECTOR OF THE DEPARTMENT OF CHILDREN AND FAMILY SERVICES, etc.,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

OPINION BELOW

The opinion of the Supreme Court of Illinois (App. A. of Petition) is reported at 33 Ill. 2d 60, 210 N. E. 2d 217.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether, in an action brought by a state agency to enjoin the operation of a privately supported child care

institution on the ground that it has no license, the court may deny standing to the institution to raise a federal constitutional objection to a state statute because said institution has not applied for a license under such statute that it alleges to be unconstitutional.

2. Whether a state statute regulating child care facilities by a state agency which also gives discretionary authority to the state agency charged with the duty of administering a Child Care Act to employ a private individual, group, or institution to make investigations of the qualifications of an applicant for a license to operate a children's home and then make recommendations to the state agency, which is not bound by such recommendations, deprives the applicant of due process of law and equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States by subjecting the applicant to such recommendation which is not binding upon the state agency.

STATEMENT OF THE CASE

Petitioner has been operating as an unlicensed institution for the care of children since March 9, 1956, when renewal of its license was refused by Respondent's statutory predecessor.

Petitioner in challenging this determination has exhausted all of its administrative and legal remedies including affirmation of this decision by the Appellate Court for the First District of Illinois, denial of leave to appeal by the Supreme Court of Illinois and denial of a petition for writ of certiorari by this Court. *Illinois Protestant*

Children's Home v. *Department of Public Welfare,* 372 U. S. 967 (1963).

The instant proceeding was to enjoin petitioner from further operation of its institution on the sole basis that it was unlicensed.

Injunctive relief was granted by the trial court and affirmed by the Illinois Supreme Court (App. A., *infra*). Petitioner was afforded an opportunity to apply for a new license, but declined to do so. Belatedly after the masters report in this cause was filed, Petitioner for the first time raised constitutional objections to the statutes involved.

REASONS FOR DENYING THE WRIT.

The instant petition for writ of certiorari is clearly without merit, presents no substantial federal question and equally important, as the Supreme Court of Illinois correctly held, Petitioner has no standing to challenge the constitutionality of the statute since there is no showing of either injury to Petitioner or that the sections of the statute complained of will be applied. (33 Ill. 2d 60, 210 N.E. 2d 217). The statute on its face permits and authorizes the Respondent alone, as opposed to the private agency or person, to make the determination as to whether or not an applicant such as Petitioner is entitled to a license.

Petitioner has apparently abandoned all attacks on the statutory scheme with the exception of the provision of the statute (Chapter 23, Section 2316(b) of the Ill. Rev. Stats. 1963 Ed.) which authorizes Respondent, at its option, to delegate the examination of an applicant to a licensed child welfare agency or other suitable agency or person designated by Respondent as its agent for that purpose.

The statute on its face clearly shows that Respondent is not bound by the findings of such agency or person and that such provision is merely permissive. Accordingly, the statute is not unconstitutional or invalid on its face.

Even if substantively part of the statute or the statute itself were deemed constitutionally offensive after examination, the posture of the present fact situation is not conducive to review by this Court at this time.

With certain exceptions not here relevant, this Court has held that a party seeking federal constitutional review must be able to show not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement. *Doremus* v. *Board of Education,* 342 U. S. 429, 434, 72 S. Ct. 394 (1952).

The Petitioner here not only declines to apply for a license under the statute so as to bring itself within its application, but equally important cannot demonstrate that the provision of the statute challenged here will ever be applied against Petitioner. A more hypothetical situation inappropriate for review by this Court could not be better demonstrated.

Decisions apparently to the contrary cited by Petitioner are easily distinguished as involving statutes clearly held invalid on their face or prior restraint questions under the First Amendment. *Freedman* v. *State of Maryland,* 380 U.S. 51, 85 S. Ct. 734 (1965); *Allied Stores of Ohio, Inc.* v. *Bowers,* 358 U. S. 522, 79 S. Ct. 437 (1959); *Staub* v. *City of Baxley,* 355 U.S. 313, 78 S. Ct. 277 (1958); *First National Bank of Guthrie County* v. *Anderson,* 269 U. S. 341, 46 S. Ct. 135 (1926).

Decisions such as *Carter* v. *Carter Coal Co.,* 298 U. S. 238, 56 S. Ct. 855 (1936) have not only long since been distin-

guished by this Court but is inapposite to the present situation where there is no abdication of Respondent's function to a private body.

On the merits of the substantive question presented herein, Respondent will merely allude to this Court's decision in *Eagles* v. *United States*, 329 U. S. 304, 67 S. Ct. 313 (1946) which in Respondent's view is a clear holding by this Court that an administrative agency may constitutionally be permitted to employ private persons or entities for examination and investigation to advise an administrative agency, in the absence of completely abdicating its ultimate responsibility to make the decision. Accordingly, not only is review by this Court inappropriate on the issues of standing and injury to Petitioner, but clearly this Court has already decided the substantive question adversely to Petitioner.

Finally, Petitioner argues in effect that Respondent has prejudged any application for license presented by Petitioner. Petitioner has been given and still has the opportunity to apply to Respondent for a license. It is apparent that the delay in deciding the license renewal matter was solely attributable to Petitioner's various proceedings through the Courts. Moreover, while this proceeding was pending before the Illinois Supreme Court, Petitioner moved for a stay of the proceedings upon substantially the same grounds that it argues in its petition. Respondent objected to any such stay for the principal reason that Petitioner had been unlicensed but had continued to operate while unlicensed through the entire period of litigation in excess of seven years. Presented with these facts, the Illnois Supreme Court denied the stay. (App. B, *infra*)

CONCLUSION.

For the numerous and significant reasons set forth herein, namely Petitioner's clear lack of standing, absence of injury, absence of showing that the sections of the statute complained of will be applied against Petitioner if it applies for a license and the absence of showing that the decision of the private agency or person would be binding upon Respondent, this cause, it is urged, is clearly inappropriate for review by this Court.

Even if the Court were to decide, adversely to this contention of Respondent the question of standing, injury and the construction of the statute, as submitted by Respondent, the validity of the statute on the merits, in Respondent's opinion, has already been determined adversely to Petitioner. *Eagles* v. *United States, supra.*

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

WILLIAM G. CLARK,
Attorney General of the State of Illinois,
Attorney for Respondent.

RICHARD A. MICHAEL,
STUART D. PERLMAN,
Assistant Attorneys General,
JEROME F. GOLDBERG,
Special Assistant Attorney General,
Of Counsel.

APPENDIX A.

UNITED STATES OF AMERICA

STATE OF ILLINOIS, } ss.
SUPREME COURT. }

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the tenth day of May in the year of our Lord, one thousand nine hundred and sixty-five, within and for the State of Illinois.

Present: Ray I. Klingbiel, Chief Justice

Justice Joseph E. Daily — Justice Walter V. Schaefer
Justice Harry B. Hershey — Justice Byron O. House
Justice Roy J. Solfisburg, Jr. — Justice Robert C. Underwood
William G. Clark, Attorney General
Robert G. Miley, Marshal
Attest: Mrs. Earle Benjamin Searcy, Clerk

Be It Remembered, that, to-wit: on the 20th day of May, 1965, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said court, had and entered of record, to-wit:

People of the State of Illinois, ex rel. The Director of the Department of Children and Family Services, Donald Brieland, Ph.D., *Appellee,* vs. Illinois Protestant Children's Home, Inc., a corporation, *Appellant.*	Appeal from Circuit Court Cook County 62 C 4099 Error to
No. 38850	

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and in-

spected as well the record and proceedings aforesaid, as matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the decree aforesaid, is there anything erroneous, vicious or defective, and in that record there is no error.

THEREFORE, it is considered by the Court that the decree of the Circuit Court of Cook County aforesaid, BE AFFIRMED IN ALL THINGS AND STAND IN FULL FORCE AND EFFECT, notwithstanding the said matter and things therein assigned for error.

I, MRS. EARLE BENJAMIN SEARCY, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said court this 30th day of September, 1965.

(SEAL) /s/ Mrs. Earl Benjamin Searcy

Clerk,

Supreme Court of the State of Illinois.

APPENDIX B.

(Seal)
State of Illinois
Office of
CLERK OF THE SUPREME COURT
Springfield

Mrs. Earle Benjamin Searcy
Clerk

Area Code 217
Telephone
525-2035

September 29, 1964

Hon. William G. Clark
Attorney General
160 North LaSalle Street
Chicago, Illinois

Dear Mr. Clark:

In Supreme Court today, in case No. 38850 entitled:

People ex rel. The Director of the Department of Children and Family Services, etc., appellee

vs.

Illinois Protestant Children's Home, Inc., a corp., appellant

motion by appellant that the order appealed from be stayed pending disposition of this appeal was denied.

Very truly yours,
Mrs. Earle Benjamin Searcy
Clerk of the Supreme Court